WASHINGTON POST
3 July 1983

In Celebrating Our Liberties, Think of Those We're Losing

By Mark H. Lynch

A SOBERING REMINDER for this July 4 weekend: Over the past decade, the federal courts have quietly relinquished their responsibility to protect civil liberties whenever the government invokes "national security."

Indeed, if the government taps your phone, breaks into your house, opens your mail or places an informer in your office in the name of national security, the chances are slim today that the courts will do anything to protect your rights. There is even reason to fear that the reluctance of judges to impose prior restraints on the press is eroding — that if the Pentagon Papers case arose today, the government would succeed in its effort to suppress that history of U.S. involvement in Vietnam.

A nation founded on individual rights and a suspicion of central power would do well to note this remarkable development.

In a 1972 case restricting warrantless wiretapping, for example, the Supreme Court wrote that "our task is to examine and balance the basic values at stake in this case: the duty of government to protect the domestic security, and the potential danger posed by unreasonable surveillance to individual privacy and free expression." But by 1981 the High Court was not so concerned about individual rights. "It is 'obvious and unarguable,' " it wrote, "that no governmental interest is more compelling than the security of the nation."

If this were not enough, the courts have also abdicated their responsibility to seriously *examine* national security claims. The rationale here is that the executive branch deserves "utmost deference" in national security matters.

This notion rests heavily on judges' insistence that they are incapable of understanding national security matters and therefore must yield to the executive branch.

The courts, of course, have not always claimed such incompetence for themselves. In 1972, for instance, the Supreme Court rejected a government argument that "internal security matters are too subtle and complex for judicial evaluation." In that opinion, Justice Lewis Powell said that since "courts regularly deal with the most difficult issues of our society, there is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues in domestic security cases."

Since 1976, however, decisions in a score of cases have rejected judicial competence in national security matters.

Consider, for example, a 1978 ruling by the U.S. Court of Appeals for the District of Columbia. It involved the National Security Agency's former practice of intercepting — without judicial warrants — the international telephone calls and telegrams of American citizens to gather information on the civil rights and antiwar movements. As revealed in Senate investigations, the agency targeted some 1,200 U.S. citizens.

When likely targets sued, in a case called *Halkin v. Helms*, , the secretary of defense claimed that it would harm national security to confirm or deny whether NSA had intercepted any of their messages. The appeals court found that this assertion of the "state secrets" privilege was entitled to "utmost deference." Since there could be no public acknowledgement that any plaintiff's messages had been intercepted, the court simply dismissed the case.

In another portion of *Halkin*, the plaintiffs challenged a CIA surveillance program aimed at the antiwar movement. Despite a 1947 law barring it from conducting intelligence operations in the United States, the CIA had infiltrated domestic organizations. It also had tracked movements and contacts of U.S. activists abroad, and documents in the case indicated that the CIA used foreign security services to conduct electronic surveillance and burglary operations against U.S. citizens.

Despite this general evidence, the trial and appeals courts upheld the government's state-secrets privilege to withhold evidence regarding specific plaintiffs. Without this information, the courts refused to rule on the legality of the CIA operation. Again, case dismissed.

Other challenges to NSA's operations have also foundered on the state-secrets privilege. Harrison Salisbury, a veteran foreign correspondent and an editor with The New York Times, learned under the Freedom of Information Act that NSA had reports about him derived from intercepted foreign communications. But NSA refused to disclose whether the intercepted messages were Salisbury's or someone else's.

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